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In The

Supreme Court of the United States

October Term, 1988

JEFF MAYES,

Petitioner,

vs.

STATE OF NORTH CAROLINA,

Respondent.

Petition For a Writ of Certiorari to the Supreme Court of the State of North Carolina

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QUESTIONS PRESENTED

1. In an obscenity prosecution, what are the guidelines and limitations governing admissibility of defense-proffered evidence of community standards relating to patent offensiveness, specifically, public opinion polls and expert opinion testimony?

2. Must the trial court instruct the jury as to the proper community whose standards are to be applied, or to reach a consensus as to the relevant community, when the prosecution has interchangeably spoken of the community as a county, town, or whatever the jurors consider it to be and the defense has spoken of the community as a statewide region?

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In The

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October Term, 1988

JEFF MAYES,

Petitioner,

vs.

STATE OF NORTH CAROLINA,

Respondent.

The petitioner, Jeff Mayes, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court for the State of North Carolina entered in the above-entitled proceeding on September 7, 1988.

OPINIONS BELOW

The opinion of the Supreme Court of the State of North Carolina is reported at 371 S.E.2d 476 and is reproduced in the appendix, *infra*, at page A-1, *et seq*. The opinion of the North Carolina Court of Appeals is reported at 359 S.E.2d 30 and is printed in the Appendix at page A-21, *et seq*.

JURISDICTION

The Supreme Court of the State of North Carolina entered its opinion on September 7, 1988. This petition is filed within 60 days of that date. The opinion of the North Carolina Supreme Court constitutes a final judgment in a criminal case upholding the constitutionality of procedures involved in petitioner's conviction of a violation of North Carolina General Statutes § 14-190.1. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment 1

Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

Amendment 14, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

PROVISIONS FROM THE FEDERAL RULES OF EVIDENCE

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consid-

erations of undue delay, waste of time, or needless presentation of cumulative evidence.

NORTH CAROLINA OBSCENITY STATUTES

§ 14-190.1 Obscene literature and exhibitions

(a) It shall be unlawful for any person, firm or corporation to intentionally disseminate obscenity. A person, firm or corporation disseminates obscenity within the meaning of this Article if he or it:

(1) Sells, delivers or provides or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or

(2) Presents or directs an obscene play, dance or other performance or participates directly in that portion thereof which makes it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene; or

(4) Exhibits, presents, rents, sells, delivers or provides; or offers or agrees to exhibit, present, rent or to provide: any obscene still or motion picture, film, filmstrip, or projection slide, or sound recording, sound tape, or sound track, or any matter or material of whatever form which is a representation, embodiment, performance, or publication of the obscene.

(b) For purposes of this Article any material is obscene if:

(1) The material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (c) of this section; and

(2) The average person applying contemporary community standards relating to the depiction or description of sexual matters would find that the material taken as a whole appeals to the prurient interest in sex; and

(3) The material lacks serious literary, artistic, political, or scientific value; and

(4) The material as used is not protected or privileged under the Constitution of the United States or the Constitution of North Carolina.

(c) As used in this Article, "sexual conduct" means:

(1) Vaginal, anal, or oral intercourse, whether actual or simulated, normal or perverted; or

(2) Masturbation, excretory functions, or lewd exhibition of uncovered genitals; or

(3) An act or condition that depicts torture, physical restraint by being fettered or bound, or flagellation of or by a nude person or a person clad in undergarments or in revealing or bizarre costume.

(d) Obscenity shall be judged with reference to ordinary adults except that it shall be judged with reference to children or other especially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be especially designed for or directed to such children or audiences.

(e) It shall be unlawful for any person, firm or corporation to knowingly and intentionally create, buy, procure or possess obscene material with the purpose and intent of disseminating it unlawfully.

(f) It shall be unlawful for a person, firm or corporation to advertise or otherwise promote the sale of material represented or held out by said person, firm or corporation as obscene.

(g) Violation of this section is a Class J felony.

(h) Obscene material disseminated, procured, or promoted in violation of this section is contraband. (1971, c.405, s.1; 1973, c.1434, s.1; 1985, c.703, s.1.)

STATEMENT OF THE CASE

This case involves a criminal obscenity prosecution under North Carolina's recently enacted anti-pornography statute, N.C.G.S. § 14-190.1. For more than a decade prior to the effective date of this new law, there were virtually no obscenity prosecutions in that state because of a now defunct requirement of an adversary hearing prior to prosecution. Currin & Showers, *Regulation of Pornography — The North Carolina Approach*, 21 Wake Forest L. Rev. 263 (1986). In fact, research reveals that there were only two reported cases involving prosecutions for obscenity in North Carolina in that decade, as opposed to nine reported in the two and one-half years since the law took effect.

Petitioner, Jeff Mayes, a store clerk at the Shelby III Adult Bookstore, was arrested on October 9, 1985, in Cleveland County, North Carolina, and charged with disseminating obscenity for his sale of two magazines to a sergeant of the local Sheriff's Department. The sales for which he was arrested occurred on the date that the new statute became law.

At the trial of this action, the state presented one witness, the officer who purchased the magazines at issue. This officer's testimony and the magazines were the only evidence introduced by the prosecution.

The defense began its case with an offer of testimony from Dr. Terry Cole, a professor at Appalachian State University. Dr. Cole was qualified as an expert in speech communication in the context of public communication. During voir dire, Dr. Cole expressed his expert opinion that the magazines in question did not depict sexual conduct in a patently offensive way, both because of the context in which they were made available and because he believed that they were not offensive to the degree required to fall outside the protection of the First Amendment. He also stated his opinion that, applying contemporary community standards of the average person, the material would not appeal to a prurient interest in sex. Further, based on his classroom use of such materials in the study of First Amendment law and scholarly research, he concluded that the material had serious political and scientific value. Although his qualifications as an expert had been accepted, the trial court did not permit Dr. Cole to place any of these opinions before the jury for their consideration. The Supreme Court of North Carolina found that the trial court erred in refusing to permit Dr. Cole to testify, but concluded that the error was harmless.

Subsequently, the defense tendered to the court the expert testimony of Dr. Charles Winick, a renowned expert in the fields of obscenity statistics and surveying. The intent of the proffer was to assist the jury in its determination of whether the average adult, applying contemporary community standards, would find that the subject materials were patently offensive and exceeded the community level of tolerance or acceptance for such materials. Dr. Winick advised the court as to his lengthy credentials, which included conducting surveys for the Presidential Commission on Obscenity, publishing over 400 articles and 20 books regarding sexually-related matters, and acting as an advisor to the Office of the United States Attorney and the Attorney General of the State of New York. Dr. Winick testified that he had taught survey methods for 35 years and that his work with surveys included projects with such individuals as Gallop, Roper and Harris.

In his proffer, Dr. Winick explained at length the typical methodology employed in conducting public opinion polls. Furthermore, he described the particular methodology used in conducting a poll for the instant action dealing with the acceptance or tolerance of sexually explicit materials in the State of North Carolina. Based upon his survey and his expert qualifications, Dr. Winick was permitted to offer his opinion that the magazines in question were not patently offensive and did not appeal to the average person's prurient interest in sex. Dr. Winick was also allowed to testify as to the scientific value of the works in question. However, Dr. Winick was allowed to present only two of the substantive questions asked in the survey poll which were used as the basis for his opinion. The first question allowed indicated that 73% of North Carolinians believed that standards have changed in recent years so that depictions of nudity and sex are more acceptable. The second demonstrated that 90% of those asked understood that the terms "nudity" and "sex" meant exposure of the genitals and every kind of sexual activity, no matter how graphically depicted.

Dr. Winick, however, was not permitted to present the results of any of the other survey questions, including those which indicated that approximately three quarters of North Carolinians agree that adults have a right to obtain, purchase and view such sexually explicit material and that it is all right for them to do so. Finally, the defense called Jan Frankowitz, a private investigator, to lay the foundation for admission of magazines comparable to those at issue. This evidence was offered to guide the jury in assessing the relevant community standard it was to apply to the magazines purchased from defendant Mayes. The court flatly rejected the defense argument that such materials were relevant to prove the contemporary community standards and excluded in toto the defense offer of proof.

On the issue of contemporary community standards, the prosecution had alternatively urged throughout the trial that the court or jury apply the contemporary community standard of the congressional district, county, judicial district or a more local community in assessing whether the magazines were obscene. The defense urged the jury to define North Carolina, as a whole, as the relevant community. The charge which was delivered to the jury did not define "community" or instruct the jury to reach any consensus as to the geographic bounds of the community standard they were to apply.

After deliberations, the jury returned a verdict convicting the defendant of two counts of disseminating obscenity.

Thereafter, defendant Mayes was sentenced to a term of imprisonment for one year on both counts. Execution of the sentence was suspended, and the defendant was placed on supervised probation for a period of five years with an active term of six months in the custody of the North Carolina Department of Corrections, a $750.00 fine was also imposed.

On appeal to the North Carolina Court of Appeals, petitioner took issue with the exclusion of expert testimony and the failure of the trial court to properly advise the jury as to the relevant community standards to be applied. The majority affirmed the defendant's conviction with one judge concurring in part and dissenting in part. The dissent stated that the trial court's refusal to define or elaborate on the term "contemporary community standard" was error where, as here, the prosecutor had argued that the relevant community was a certain county, city, or whatever the jurors might think their community to be. In contrast, the defense urged the jury that the standard should be a statewide one. In light of these arguments, the dissent found that a clarifying instruction was particularly important.

Subsequently, the Supreme Court of North Carolina accepted the case for review. The Supreme Court affirmed the intermediate appellate court's determination, though holding that the trial court erred in excluding the testimony of Dr. Terry Cole. The Supreme Court, however, found such error harmless.

The petitioner's sentence has been stayed by the state court pending determination of his request for further review by this Court.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE NORTH CAROLINA SUPREME COURT EVIDENCES THE NEED FOR THIS COURT'S GUIDANCE IN DETERMINING THE ADMISSIBILITY OF DEFENSE-PROFFERED EXPERT TESTIMONY

A decade and more has passed since this Court last discussed the use of expert testimony in the obscenity area. *See*, *Kaplan v. California*, 413 U.S. 115, 121 (1973). That decision and this Court's earlier words in *Smith v. California*, 361 U.S. 147, 160 (1959), have provided scant guidance to federal and state courts struggling with complicated obscenity issues.

Defendants have explored various means for educating jurors as to the issues of patent offensiveness, appeal to prurient interest, and contemporary community standards as well as literary, artistic, political and scientific value issues.

Relying on the words of Justice Harlan in *Smith v. California*, that "a community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates" (*Id.* at 171), defendants have routinely attempted to introduce evidence relating to community tolerance or acceptance of explicit sexual mate-

rials. Defendants have proffered public opinion polls (*see, e.g., Saliba v. State*, 475 N.E.2d 1181 [2d Dist. Ind. 1985]; *People v. Nelson*, 88 Ill.App.3d 196, 410 N.E.2d 476 [1980], ethnological studies, *State v. Anderson*, ____N.C.____, 366 S.E.2d 459 (1988); and *United States v. Pryba*, 678 F.Supp. 1225 [E.D.Va. 1988]; comparable materials, *Womack v. United States*, 294 F.2d 204 [D.C. Cir. 1961]) and various other methods of assessing contemporary community standards. The numerous courts deciding these issues have varied in their acceptance or rejection of these forms of evidence.

In the case at bar, the defendant proffered expert testimony on contemporary community standards by a public opinion poll, comparable materials and expert opinion testimony. The trial court refused to permit introduction of each of these evidence forms. The appellate courts, unguided by direction of this Court, upheld the exclusion of such evidence. Specifically, in determining the admissibility of a public opinion poll, the court relied on a similar Georgia case (*State v. Flynt*, 44 Ohio App.2d 315, 338 N.E.2d 554 [1975]) while rejecting nearly identical polls admitted in Illinois, Texas and Indiana. *See, e.g., People v. Nelson, supra; Saliba v. State, supra;* and *Carlock v. State*, 609 S.W.2d 787 (Texas, 1980).

This is but one example of the divergent views existing as to the admissibility of expert testimony in the obscenity area. As further detailed hereinafter, the lack of guidance by this Court has resulted in a confusing body of conflicting case law. This Court should seize the opportunity to resolve conflicting views on the relevance and admissibility of such evidence.

A. Guidance and the Resolution of Conflicts Regarding the Use of Public Opinion Polls Aimed at Assisting Juries In Determining Contemporary Community Standards is Badly Needed for the Trial Courts and Legal Practitioners.

The use of public opinion polls to gauge contemporary community standards has become a vital tool in the defense of obscenity actions. However, courts have reacted in various ways to admission of such evidence.

In the case at bar, the defense proffered Dr. Charles Winick, a national authority in the field of public survey research. Dr. Winick was called to testify as to the results of a public opinion poll conducted to determine the community's acceptance or tolerance of sexually explicit materials such as those which were the subject of the trial.[1] The objective was to provide the jury with information regarding contemporary community standards as it related to adult materials to assist the jury in its determination of whether the materials were patently offensive.

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[1] The survey questions and responses are reproduced in the Appendix hereto at A-36.

The questions presented to the interviewees were aimed at determining whether the community found it acceptable/tolerable[2] to view materials depicting exposure of the genitals and every kind of sexual activity, no matter how graphically depicted.

The sexual activities depicted in the two magazines were encompassed by this description. The survey results showed that an overwhelming majority of those polled found the viewing of such depictions acceptable and, hence, not patently offensive. The trial court, however, refused admission of the survey questions and results.[3]

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[2] Both the trial and intermediate appellate courts expressed confusion over the applicability of "toleration" versus "acceptance" as the measuring stick for evaluating contemporary community standards, as suggested by the language of this Court in *New York v. Ferber*, 458 U.S. 747, 761, fn.12 (1982) ("It would be equally unrealistic to equate a community's *toleration* for sexually oriented material with the permissible scope of legislation aimed at protecting children from exploitation.") Confusion as to the correct standard is an additional reason for this Court to accept this case for review. *See, Jacobellis v. Ohio*, 378 U.S. 184 (1964) (Communities vary in their *toleration* of alleged obscenity); *Smith v. United States*, 431 U.S. 291, 300-301 (1977) (our decision that contemporary community standards must be applied by juries in accordance with their own understanding of the *tolerance* of the average person in their community does not mean, as has been suggested, that obscenity convictions will be virtually unreviewable). *See, also, United States v. Petrov*, 747 F.2d 824 (2d Cir. 1984), *cert. denied*, 471 U.S. 1025 (1985) (a key issue in any obscenity case is the degree of community *acceptance or tolerance* of materials similar to those at issue); *United States v. Various Articles of Obscene Merchandise, Schedule No. 2102*, 709 F.2d 132 (2d Cir. 1983) (to arrive at a measure of community tolerance of pornographic material the trier must decide what most people seem to think about such materials). *Compare, United States v. Battista*, 646 F.2d 237 (6th Cir. 1981), *cert. denied*, 454 U.S. 1046 (*acceptance, not tolerance*, is the proper measure).

[3] The case of *Anderson v. North Carolina* is currently pending before this Court on petition for writ of certiorari. Dr. Winick's survey results were excluded in that case as well.

The questions set forth in the proffered survey are nearly identical to those used across the nation. However, state and federal courts have reached different conclusions as to the admissibility of these surveys. For example, in *People v. Nelson*, *supra*, *Saliba v. State*, *supra* and *Carlock v. State*, *supra*, the courts admitted survey questions and results nearly identical to those posed here. On the other hand, the courts in *United States v. Pryba*, *supra* and *Flynt v. State*, *supra*, have ruled similar questions and results inadmissible. These conflicting decisions result from court confusion as to what are contemporary community standards and how does one measure them.

In *Nelson*, the court found that the questions and results at issue were appropriately directed to measuring attitudes of adults regarding the acceptance or nonacceptance of sexually explicit materials.[4] Interviewees there were questioned as to whether it was all right — acceptable for adults to view or purchase films, magazines, or other publications depicting total male and/or female nudity and sexual intercourse including all kinds of sexual variations. Since the materials at issue fit within this definition, the court determined the results were relevant to and weighed heavily against a finding that the movies were patently offensive. The court reasoned that ". . . the survey results are strong evidence that the community standards would accept or at least would not reject portrayal of sexually explicit materials in movies if limited to adult viewers. In fact, survey evidence may be the only way to prove degrees of acceptability of a product or material, as distinct from its availability." *Nelson*, *supra*, at 479.

In *Saliba v. State*, *supra*, an Indiana court addressed nearly identical survey questions and likewise found the results relevant to what is generally acceptable in the community. The court

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[4] Those questions posed by the interviewers in *Nelson* are reproduced in the Appendix at page A-38.

explained that the poll's failure to question the population on the ultimate issue was not error as the population's *general opinion* was probative of community standards.[5] The court emphasized that the majority of the community need not desire to view sexually explicit materials in order to establish community acceptance or tolerance of such materials. Rather, the *Saliba* court advised, the issue concerns the population's perception of what is generally acceptable in a community considering the intended and probable recipients of the materials. Because the questions measured the interviewees perception of what was acceptable, the survey results were held relevant to the jury's determination.

The *Saliba* court further noted that the questions asked were helpful in determining the acceptance of the particular film because the sexual activity portrayed in the film fell within the definition of "nudity and actual or pretended sexual activity" as defined by the poll question.

Similarly, in *Carlock v. State, supra*, a Texas appellate court concluded that a public opinion survey was relevant in measuring the standards existing in the county concerning explicit sexual materials. Although the survey addressed the interviewees' general opinions regarding obscenity rather than the community's opinion of the particular magazine in question, the court found such evidence relevant to the determination of contemporary community standards. The court noted that any weakness in the proffered survey went to weight not admissibility.

Yet, two other courts have excluded similar questions, reasoning that survey questions such as those at issue in the aforementioned cases do not determine whether the contents of the specific magazines on trial would or would not exceed the limits of permissible candor in the depiction of nudity and sex and that such ques-

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[5] Those questions posed by the interviewers in *Saliba* are reproduced in the Appendix at page A-40.

tions are posed more as a referendum on the obscenity statutes. *See, Flynt v. State, supra; United States v. Pryba, supra.*

As a result of these varying opinions on the admissibility of nearly identical surveys, defendants are at a loss in attempting to present a complete defense to an obscenity charge. Hampered by the inability via a survey to actually show the interviewees the magazines at issue, for fear of prosecution, the surveyor is left with constructing questions designed to measure the community's acceptance of sexually explicit materials. In the absence of direction from this Court, defendants are forced to guess at the propriety of questions designed to measure the attitudes of the community regarding sexually explicit materials.

When Judge Learned Hand created the community standards concept in *United States v. Kennerly*, 209 F. 119 (S.D.N.Y. 1913), he suggested:

> "[s]hould not the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now? If letters must, like other kinds of conduct, be subject to the social sense of what is right, it would seem that a jury should in each case establish the standard much as they do in cases of negligence. To put thought in leash to the average conscience of the time is perhaps tolerable, but to fetter it by the necessities of the lowest and least capable seems a fatal policy."

The thrust of this language, discussing as it does the "social sense of what is right" seems to be properly reflected in the survey questions proffered in this case and in *Nelson* and *Saliba*. By refusing admission of such survey results, the North Carolina court here, as well as the *Flynt* and *Pryba* courts have stymied defendants in their attempts to educate the jury as to the elusive obscenity concepts and have prohibited them from presenting a

complete defense in an area where the compass of information given to a jury for its consideration should be at its widest.

B. The Lack of Guidance in the Area of Expert Opinion Testimony Resulted in the Exclusion of a Defense Proffered Speech and Communication Expert.

The defense proffered the testimony of Dr. Terry Cole and the Court certified him as an expert in the area of speech and communication in the context of public communication. On *voir dire*, Dr. Cole testified that his experiences included a study of the language of the obscenity statute and its application to specific works. He explained to the trial court that he had studied the language of the obscenity law in question and could offer his communications expertise to the interpretation of the words contained therein as they applied to the specific works in question. In addition, he advised that he had used such materials throughout his teaching career to assist students in understanding and applying First Amendment law. Thus, over the years, he had considerable opportunity to observe the reactions and hear articulated the opinions of many students while they considered whether a range of materials met the various standards of obscenity. He further explained that he had made a systematic study of sexually explicit materials, comparing them against the various Supreme Court opinions rendered in this area, as well as comparing them against the specific language of the North Carolina obscenity statute. He advised that this was an accepted methodology to use in such a review.

Dr. Cole also advised the court as to the work's scientific and political value. He explained, based upon his communications backgrounds, the political nature of the materials at issue and their serious value in the political realm. In particular, he

explained the value of their contribution to the broad marketplace of ideas which the First Amendment was primarily designed to protect.

Lastly, he explained the educational and scientific value of the works in educating the populous as to the ideas represented therein and the communicational value of the materials in that regard. He also spoke of the work's scientific value in improving communication about sexual activities among partners as a result of being exposed to this type of material.

The trial court refused to allow any portion of this testimony to go to the jury. Although the Court of Appeals found the trial court's decision correct, the Supreme Court of North Carolina disagreed, holding that the trial court's refusal to admit this testimony was error. The Supreme Court explained that Dr. Cole was qualified to give his expert opinion that the magazines at issue were not patently offensive and did not appeal to the prurient interest in sex. This decision was based on the fact that Dr. Cole had years of experience in teaching speech communication, including the use of sexually explicit materials at a North Carolina university; had used magazines of this type throughout his teaching career to assist students in the understanding and application of the First Amendment and state law relating to obscenity; and, had made a specific study of the subject. However, they concluded that the error was harmless.

Thus, even within this single state's court system, differing views as to the necessity for and relevancy of expert testimony have come to light. Without a guiding hand from this Court, judges across the country are left to meander through the uncharted waters of expert testimony in the obscenity realm. The hazards encountered along the way most often are borne by the defendants in that the evidence they proffer is excluded. This situation demands this Court's immediate attention.

C. This Court's Direction is Needed for Determining To What Extent Comparable Material Evidence is Admissible to Prove Community Standards.

The court in *Womack v. United States*, 294 F.2d 204 (D.C. Cir.), *cert. denied*, 365 U.S. 859, 81 S.Ct. 826, (1961), introduced the concept that the existence of comparable materials may be relevant to a showing that works are acceptable in the community. The rationale behind the admission of comparative evidence is to allow the defendant to attempt to persuade the trier of fact that the challenged material does not exceed contemporary community standards. *Flynt v. State*, 153 Ga. App. 232, 264 S.E.2d 669, *cert. denied*, 449 U.S. 888, 100 S.Ct. 2960 (1980). Since the 1961 *Womack* decision, numerous courts have faced the issue of whether certain comparable materials are admissible in an obscenity prosecution. The result is that:

> "there has been a considerable amount of confusion in the courts as to the admissibility and function of comparison evidence in obscenity cases. Some jurisdictions have held it reversible error to reject such evidence, while others exclude it rather summarily."

(*United States v. Womack*, 166 U.S.App.D.C. 35, 41, 509 F.2d 368, 374 (D.C. Cir. 1974), *cert. denied*, 422 U.S. 1022, 95 S.Ct. 2644; *comparing Woodruff v. State*, 11 Md. App. 202, 273 A.2d 436 (1971); *Yudkin v. State*, 229 Md. 223, 182 A.2d 798 (1962); *In Re Harris*, 56 Cal.2d 879, 366 P.2d 305 (1961) *with State v. Jungclaus*, 176 Neb. 641, 126 N.W.2d 858 (1964); *People v. Finkelstein*, 11 N.Y.2d 300, 183 N.E.2d 661 (1961); and in the federal courts *comparing Kahm v. United States*, 300 F.2d 78, 84 (5th Cir. 1962) *with Miller v. United States*, 431 F.2d 655, 659 (9th Cir. 1970).

In addition to confusion on the threshold question of admissibility of comparable material evidence, disputes have also arisen as to the foundational basis required for admission of such evi-

dence. Specifically, various lower courts have seized on the words of this Court in *Hamling v. United States*, 418 U.S. 87, 125 (1974), that "availability of similar material . . . does not automatically make [it] admissible". Thus, some courts have determined that evidence regarding availability is irrelevant and have required that a showing be made that the comparable materials enjoy a reasonable degree of community acceptance. *See, e.g., Flynt v. State*, 153 Ga.App. 232, 264 S.E.2d 669, *cert. denied*, 449 U.S. 888, 100 S.Ct. 2960 (1980). In *Flynt*, the defendant proffered distribution figures for comparable materials as evidence of community acceptance to satisfy the admissibility foundation. The court, however, determined that distribution figures were insufficient evidence of community acceptance and required sales figures to form the necessary foundational prerequisites. Relying on the words of *United States v. Manarite*, 448 F.2d 583, 593 (2d Cir.), *cert. denied*, 404 U.S. 947, 92 S.Ct. 281 (1971), that "evidence of mere availability of similar materials is not by itself sufficiently probative of community standards to be admissible in the absence of proof that the material enjoys a reasonable degree of community acceptance" and that "mere availability of similar material by itself means nothing more than that other persons are engaged in similar activities", the *Flynt* court upheld exclusion of the comparable evidence. Thus, the *Manarite* and *Flynt* courts determined that the fact that such items were available in the general community was insufficient to meet the comparable evidence test.

On the other hand, some courts have recognized that widespread community availability may be accepted as circumstantial evidence of contemporary community standards. *See, e.g., United States v. 2,200 Paper Back Books*, 565 F.2d 566, 571 (9th Cir. 1977); *Keller v. State*, 606 S.W.2d 931, 933-34 (Tex. Cr. App. 1980). Although availability and unavailability do not translate inexorably into acceptability and unacceptability, evidence of availability is relevant to the determination at hand. *United*

States v. Various Articles of Merchandise, Seizure No. 170, 750 F.2d 596, 599 (7th Cir. 1984). As stated by the court in *United States v. Various Articles of Obscene Merchandise, Schedule No. 2102*, 709 F.2d 132, 137 (2d Cir. 1983) "[a]t some point a work widely available must be considered inferentially acceptable," yet it has also been recognized that "a determination of the precise point at which a publication is so widely sold and is so generally available in the community as to warrant a finding of community acceptance is difficult to fix with assurance". *United States v. Womack*, 166 U.S. App. D.C. at 46, 509 F.2d at 379.

In an inciteful note to this confusion, the Second Circuit, which originally decided the *Manarite* case, pointed out the "circularity of the approach . . . that, in order for the defendant to place comparable photographs in evidence for the purpose of establishing community acceptance, he must first establish community acceptance". *United States v. Petrov*, 747 F.2d 824, 832 (2d Cir. 1984), *cert. denied*, 471 U.S. 1025, 105 S.Ct. 2037 (1985). That court suggested that the trial courts turn to Federal Rules of Evidence 401 and 403 which were not in effect at the time that *Hamling* and *Manarite* were decided.[6] The Second Circuit advised that comparable material that is ***available*** in the community can be viewed as relevant under Rule 401 and a balancing test performed under Rule 403 to determine if the probative value outweighs the prejudice.

In the case at bar, the defendant attempted, through private investigator Jan Frankowitz, to present to the jury magazines comparable to those at issue purchased in local convenience stores. The trial court, without reviewing the magazines, excluded them from evidence without indication as to its reasoning, thus, seemingly rejecting the use of comparable materials in an obscenity prosecution.

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[6] The North Carolina Rules of Evidence parrot the Federal Rules of Evidence.

The North Carolina appellate courts, citing *Hamling* and *Manarite*, reasoned that the exclusion was proper as the availability of magazines in local convenience stores indicated only availability not acceptability. The appellate courts thus failed to recognize the significance of availability evidence and the circularity of the reasoning expressed in *Petrov* of requiring a defendant to establish acceptance before placing materials into evidence to show acceptance.

Thus, we would ask this Court to set the record straight in this complex and confusing area of the law. We would further suggest that this Court adopt the balancing approach suggested by the *Petrov* court in attempting to resolve these conflicts.

II

THE NORTH CAROLINA SUPREME COURT'S RESOLUTION OF THIS CASE EVIDENCES THE NEED FOR THIS COURT'S GUIDANCE IN DETERMINING THE APPROPRIATE PARAMETERS OF THE JURY CHARGE REGARDING "CONTEMPORARY COMMUNITY STANDARDS".

"Contemporary community standards", a seemingly uncomplicated and straightforward phrase, caused significant confusion in this case, as it has since its adoption in *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304 (1957). Since that time, this and many lower courts have struggled with exactly how the term is to be applied and the precise standards it proscribes.

In *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607 (1973), this Court clearly rejected a "national" standard for contemporary community standards, but left open not only the appropriate standard, but a Pandora's box which unleashed both a variety of standards and a panoply of ways to determine such standard.

Thus, several states have the geographical definition of the term written into their obscenity statutes,[7] while others have had the appropriate standard engrafted into their regulatory scheme through case law decisions.[8]

North Carolina, however, has determined that this Court's *dicta* in *Jenkins v. Georgia*, 418 U.S. 153, 94 S.Ct. 2750 (1974) and *Hamling v. United States*, 418 U.S. 87, 94 S.Ct. 2887 (1974), have left the state in the position of never having to verbalize a standard to the public in danger of breaking the law, or to the defendants charged with breaking the law, the defense lawyers or the jurors. Consequently, this determination should be reviewed by this Court, and the language in *Jenkins* and *Hamling* should be clarified.

In *Jenkins v. Georgia*, this Court stated: "[w]e . . . agree with the Supreme Court of Georgia's implicit approval of the trial court's instructions directing jurors to apply 'community standards' without specifying what 'community'" 418 U.S. at 157, 94 S.Ct. at 2753. In *Hamling v. United States*, the Court further explained that "[a] juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination. . ." 418 U.S. at 104, 94 S.Ct. at 2901. Since, in that case, the jurors were drawn from a pool comprised of residents of the Southern

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[7] *See*, e.g., Conn. G.S.A. 53 a-193(a); Hawaii R.S., Penal Law** Code §§ 712-1210(1); Mass. G.L. Ch. 272, § 31; Montana Code Annon. Crimes, § 45-8-210; Or. R.S. § 167.087; S.D.Ch. 165, Acts of 1964 § 1; Tenn. Code Section 39-3010 (6th); Vt. Stat. Ann. T 13, § 2806 (B); West Va. Code § 61-8A-1(7).

[8] *See*, e.g., *Trans Lux Corp. v. State Ex. Rel. Sweeton*, 366 So.2d 710 (Ala. 1979); *State v. Bartanen*, 121 Ariz. 454, 591 P.2d 546, *cert. denied*, 444 U.S. 884, 100 S.Ct. 174 (1979); *McCrary v. State*, 533 P.2d 629 (Okla. Crim. App. 1974); *People v. Tabron*, 544 P.2d 380 (Colo. 1976); *Davison v. State*, 288 So.2d 483 (Fla. 1973); *People v. Ridens*, 59 Ill.2d 362, 321 N.E.2d 264 (1974); *Ebert v. Maryland State Bd. of Censors*, 19 Md. App. 300, 313 A.2d 536 (1973); *People v. Heller*, 33 N.Y.2d 314, 352 N.Y.S.2d 601 (1973).

District of California, this Court presumed that the standards the jurors used were of that community, and there was nothing in the record upon which it could or should have concluded otherwise.

In the case at bar, however, the jurors were not merely left without guidance as to what community defines the parameters in determining the community standard, but they were given conflicting information as to what the relevant community should be.

At one point, the prosecutor told the jurors that the county was the community. At another, he told them.

> ". . . I'll ask you to think about where you live, whether its King's Mountain, whether its Boiling Springs, or here in the City of Shelby. You think about your community and think about the entire County and if you live right on a county line, think of your community, whatever you consider your community to be."

The defense, on the other hand, urged that the State of North Carolina was the proper standard, particularly in light of the fact that part of one of the towns from which the jurors were picked was located in an adjoining county.

The vague instruction given by the trial court, to apply "contemporary community standards" did not assist the jurors in their deliberations. The North Carolina Supreme Court sanctioned the trial court's refusal to clarify the term, stating that the magazines were sold in the same county from which the venire and petit jury were drawn and selected. However, the jury was never told that their county was the proper geographic region whose standards were to be applied.

In fact, the survey the defendant conducted and introduced into evidence to establish a factual basis of the contemporary community standard, utilized a statewide standard, not a countywide one.

As a result of this vague and confusing situation, North Carolina has adopted the senseless position that jurors need not be guided through this vital contemporary community standards prong of the *Miller* test. The danger exists that other states will adopt this misreading of *Jenkins* and *Hamling*, that jurors will not be required to come to a consensus as to the relevant community, and, that so many different standards exist that a work sold in a village which is located within a town can have two different standards applied in determining its obscenity *vel non*.

Accordingly, this Court is requested to accept this case for review to clarify the appropriate parameters of those jury instructions relating to contemporary community standards as well as to correct the state court's misinterpretation of *Jenkins* and *Hamling* that since there are no precise limitations on the term "contemporary community standards", no judicial guidance to citizens, litigants or jurors is required.

CONCLUSION

This case presents the Court with an ideal opportunity to resolve various conflicts regarding the use of expert testimony and comparable materials in an obscenity case. Although this Court has recognized the constitutional right of a defendant to present expert testimony, it has not established guidelines for the admission of such evidence.

Secondly, the opportunity is presented here for the Court to clarify the "contemporary community standards" issue as it relates to the instructions which must be given to a jury.

Dated: Buffalo, New York
November 4, 1988

Respectfully submitted,

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APPENDICES

IN THE SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA

v. No. 514A87 - Cleveland

JEFF MAYES

On defendant's petition for discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 86 N.C. App. 569, 359 S.E.2d 30 (1987), affirming a judgment entered by Owens, J., at the 19 August 1986 Criminal Session of Superior Court, Cleveland County, upon defendant's conviction by a jury on two counts of disseminating obscenity in violation of N.C.G.S. § 14-190.1. Heard in the Supreme Court 12 May 1988.

LACY H. THORNBURG, Attorney General, by Steven F. Bryant, Assistant Attorney General, for the State.

LIPSITZ, GREEN, FAHRINGER, ROLL, SCHULLER & JAMES, by Herbert L. Greenman, and JAMES, McELROY & DIEHL, by Edward T. Hinson, Jr., for defendant-appellant.

SMITH, PATTERSON, FOLLIN, CURTIS, JAMES & HARKAVY, by Michael K. Curtis, *amicus curiae* for the North Carolina Civil Liberties Union Foundation, Inc.; ENNIS, FRIEDMAN & BERSOFF, by Mark D. Schneider, *amicus curiae* for PHE, Inc.

MEYER, Justice.

Defendant was convicted by a Cleveland County jury on two counts of disseminating obscene material in violation of N.C.G.S. § 14-190.1. The trial judge consolidated the offenses for the purpose of judgment and sentenced defendant to a term of one year's imprisonment, but suspended the sentence and placed defendant on supervised probation for five years. As a special condition of the probation, defendant was ordered to pay a $750.00 fine and to serve a six-month active prison term.

Defendant appealed his conviction to the Court of Appeals. The panel below, with one judge dissenting, found no error. Defendant entered notice of appeal on two statutory grounds: (1) the judgment of the Court of Appeals directly involves substantial questions arising under the Constitution of North Carolina, N.C.G.S. § 7A-30(1) (1986), and (2) there was a dissenting opinion in the Court of Appeals, N.C.G.S. § 7A-30(2) (1986). We allowed the State's motion to dismiss the appeal for lack of substantial constitutional question, but allowed the defendant's petition for discretionary review as to issues in addition to those presented as the basis for the dissenting opinion in the Court of Appeals. The case thus is before us based on the dissenting opinion in the Court of Appeals and our discretionary grant of review of additional issues. We affirm the Court of Appeals' decision.

The State's evidence tended to show the following: Sergeant Ralph McKinney of the Cleveland County Sheriff's Department testified that he directed the department's vice and narcotics investigations. By virtue of his position, Sergeant McKinney was familiar with the Shelby III Adult Bookstore which is located west of Shelby, and on 1 October 1985, the date on which the revisions to the state's obscenity law (N.C.G.S. § 14-190.1) took effect, he paid the store a visit.

Dressed in civilian clothes, Sergeant McKinney drove to the store in an unmarked car. Upon arrival, he was met by defendant, who was standing in the store doorway. Defendant asked Sergeant McKinney if he was a "cop." McKinney responded by asking defendant if he "looked like a cop." Defendant then remarked that he had been expecting the police all day. Sergeant McKinney asked, "You mean this stuff is illegal now?" Defendant replied, "Under the new law, it is."

Sergeant McKinney then followed the defendant into the Shelby III Adult Bookstore. He described the store as featuring a

mini movie theatre with individual booths and a large display area containing adult magazines, adult video tapes, and sexual novelties. After browsing in the store for about twenty minutes, McKinney selected two magazines and presented them to defendant at the cash register. Each magazine was wrapped in clear cellophane so that only its cover was visible. Defendant rang up the sale, and Sergeant McKinney paid for the magazines and left.

The State introduced both magazines into evidence at the trial. One magazine, *Express — The Pursuit of Pleasure*, contains several erotic stories, reviews of various erotic magazines and video tapes, interviews, advertisements, and many graphic and explicit photographs. The photographs portray nude and partially clad men and women engaged in a variety of sexual acts, including both vaginal and anal intercourse, fellatio, cunnilingus, masturbation, group sex, and bondage. The other magazine, *Cockscrew*, consists for the most part of graphic and explicit photographs of two men, sometimes nude and sometimes partially clad, engaging in fellatio, anal intercourse, and masturbation. A tenuous and scant storyline accompanies the photographs.

Defendant did not testify. However, he attempted to present three witnesses on his behalf. The first was Dr. Terry Cole, a professor at Appalachian State University, who was subsequently qualified as an expert in speech and communication in the context of public communication. During voir dire, Dr. Cole expressed his opinion that the magazines did not depict sexual conduct in a patently offensive way and that, applying the contemporary community standards, the magazines did not appeal to the prurient interest in sex. Dr. Cole testified that in his opinion the magazines had serious political and scientific value. At the conclusion of the voir dire, the trial court refused to allow the introduction of any of Dr. Cole's testimony.

Defendant next offered the expert opinion testimony of Dr. Charles Winick, a psychologist and sex therapist, who, at defendant's request, had conducted a survey of North Carolina opinion on the explicit depiction of sexual conduct. The first question in the survey asked whether, in the opinion of those interviewed, changing standards in recent years had made the depiction of nudity and sex in materials made available only to adults more or less acceptable. The next four questions were directed to whether those persons interviewed believed that consenting adults should have the right to obtain and view materials which depict nudity and sex. The final question asked whether those persons interviewed understood that the references to "nudity and sex" in the previous questions meant "exposure of the genitals and every kind of sexual activity, no matter how graphically depicted."

The trial court allowed Dr. Winick to offer his expert opinion, based on the survey, that the two magazines were not patently offensive and that they did not appeal to the average person's prurient interest in sex. Dr. Winick testified that the magazines had serious scientific value and that they were exceptional in their artistic handling of the subject matter. The trial court allowed Dr. Winick to introduce the cumulative responses to the first and final questions of the survey — the question concerning changing standards and the question concerning the definition of "nudity and sex" as used in the survey. The trial court did not permit the introduction of the cumulative responses to the intervening questions, however, concluding that those questions and answers were not relevant to any issue to be resolved at trial.

Finally, defendant called Jan Frankowitz, a private investigator, purportedly to lay the foundation for the admission into evidence of magazines comparable to those at issue. Mrs. Frankowitz testified that she purchased the two magazines proffered, *Allure* and *Club International*, at The Pantry, a local convenience store. The defense sought the introduction of these

magazines as evidence of general acceptance in the community of sexually frank materials. The trial court rejected defendant's argument that they were relevant to prove the contemporary community standard and excluded defendant's offer of proof in toto.

Defendant brings forward two issues for this Court's consideration. First, whether the trial court erred in failing properly to instruct the jurors on the appropriate community standards to be applied in determining whether the two magazines were obscene; and second, whether the trial court erred in excluding not only evidence concerning contemporary community standards, but also expert opinion evidence relevant to the application of the obscenity test.

I.

North Carolina's obscenity statute, N.C.G.S. § 14-190.1 is modeled on the test enunciated by the United States Supreme Court in Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419 (1972). The statute provides in part:

> (b) For purposes of this Article any material is obscene if:
>
> (1) The material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (c) of this section; and
>
> (2) The average person applying contemporary community standards relating to the depiction or description of sexual matters would find that the material taken as a whole appeals to the prurient interest in sex; and
>
> (3) The material lacks serious literary, artistic, political, or scientific value; and
>
> (4) The material as used is not protected or privileged under the Constitution of the United States or the Constitution of North Carolina.

N.C.G.S. § 14-190.1(b) (1986). At trial, defendant requested two jury instructions which would have required the jury to apply a statewide community standard under the "contemporary community standards" test in subsection (b)(2) of the statute. This request was denied. In its instructions to the jury, the trial court neither specifically defined the term "community standards," nor instructed the jurors to reach a consensus as to the geographic bounds of the community whose standards they were to apply.

Defendant's first issue is twofold. Initially, he contends that the North Carolina Constitution requires that a statewide standard be judicially incorporated into N.C.G.S. § 14-190.1 in order to render the statute facially valid.

This question has been recently decided against defendant. State v. Anderson, 322 N.C. 22, 366 S.E.2d 459 (1988). There, the defendant argued that N.C.G.S. § 14-190.1 was facially invalid under article 1, sections 14 and 19 of the North Carolina Constitution because it failed to provide guidance or uniformity in selection of the community by whose standards a defendant's conduct was to be judged. Anderson contended that the flaw lay in the statute's failure to specify that obscenity was to be judged in accordance with national or statewide community standards or to specify the geographical area intended by the term "community standards." Defendant here makes the identical argument. In *Anderson* we dealt with the contention as follows:

> When the same argument has been based upon the Constitution of the United States, it has been rejected. *Jenkins v. Georgia*, 418 U.S. 153, 41 L.Ed.2d 642 (1974). We are constrained to conclude that this argument is equally untenable when based upon the Constitution of North Carolina. *See State v. Bryant and Floyd*, 285 N.C. 27, 203 S.E.2d 27, *cert. denied*, 419 U.S. 974, 42 L.Ed.2d 188 (1974). As presently constituted, N.C.G.S. § 14-190.1 is not facially violative of the Constitution of North Carolina. *Cinema I Video v. Thornburg*, 83 N.C. App. 544, 351 S.E.2d 305 (1986),

aff'd, 320 N.C. 485, 358 S.E.2d 383.

Id. at 40-41, 366 S.E.2d at 470. Defendant's argument here is no more persuasive than was Anderson's.

Defendant goes on to argue that the trial court erred in failing to instruct the jury as to precisely which community standards were relevant to their determination of whether the magazines were obscene. He contends that by instructing only that the jurors apply "contemporary community standards," the trial court left the appropriate "community" open to "sheer speculation" on the jury's part. The majority of the panel of the Court of Appeals held that the trial court did not err in failing to define the geographic boundaries of the jury's "community." We agree.

In Jenkins v. Georgia, 418 U.S. 153, 41 L.Ed.2d 642 (1974), the trial court instructed the jury to apply "community standards" without defining the geographical limits of "community." The United States Supreme Court approved the instructions, stating:

> We agree with the Supreme Court of Georgia's implicit ruling that the Constitution does not require that juries be instructed in state obscenity cases to apply the standards of a hypothetical statewide community. *Miller* approved the use of such instructions; it did not mandate their use. What *Miller* makes clear is that state juries need not be instructed to apply "national standards." We also agree with the Supreme Court of Georgia's implicit approval of the trial court's instructions directing jurors to apply "community standards" without specifying what "community." *Miller* held that it was constitutionally permissible to permit juries to rely on the understanding of the community from which they came as to contemporary community standards, and the States have considerable latitude in framing statutes under this element of the *Miller* decision. A State may choose to define an obscenity offense in terms of "contemporary community standards" as defined in *Miller* without further specification, as was done here, or it may choose to

> define the standards in more precise geographic terms, as was done by California in *Miller*.

Id. at 157, 41 L.Ed.2d at 648. *See* Hamling v. United States, 418 U.S. 87, 41 L.Ed.2d 590, *reh'g denied*, 419 U.S. 885, 42 L.Ed.2d 129 (1974) (statewide standard not required); Roth v. United States, 354 U.S. 476, 1 L.Ed.2d 1498 (1956) (fact that different juries could reach different results as to whether same material is obscene is normal consequence of jury system). As presently written, N.C.G.S. § 14-190.1 reflects the Legislature's choice in defining obscenity offenses in this state in terms of "contemporary community standards" without further specification. As the Court of Appeals majority noted, in the absence of a precise statutory specification of "community," the trial court properly declined to restrict or expand the term. Rather, it instructed the jury in part as follows:

> Again, it is for you, members of the jury, to say and to decide what the contemporary community standards are, not your own standards but those of the average adult person in the community relating — with relation to the magazines depicting, illustrating or describing sexual conduct.
>
> You are not to fix a community standard, members of the jury, at a level where you believe from a personal standpoint they should be but, rather, as you find them to be.

North Carolina is a large and diverse state. As the Court of Appeals majority pointed out, no realist would expect to find that the same standards exist throughout the state, or that the residents in one area of the state would have knowledge of the community standards held in another area. N.C.G.S. § 14-190.1 allows for such diversity. We note that the magazines in this case were sold in the same county from which the venire was drawn and defendant's petit jury was selected. *See* N.C.G.S. § 9-2 (1986). The trial court's instruction thus properly permitted the jurors to apply the standards of the community in which the

indictment was returned and from which the jurors came, as they found them to be, in deciding whether the magazines sold in that community were obscene. This task differs little from the manner in which jurors determine "the propensities of a 'reasonable' person in other areas of the law." Hamling v. United States, 418 U.S. 87, 104-05, 41 L.Ed.2d 590, 613. The trial court did not err in failing specifically to define the term "community," or to instruct the jury to reach a consensus as to the geographic bounds of the community standards they were to apply.

II.

We turn now to the question of whether the trial court erred in excluding certain evidence and expert testimony proffered by the defendant.

Dr. Charles Winick, a psychologist and sex therapist, conducted a survey at defendant's request among four hundred adults in forty-one counties for trial purposes. The survey included the following questions:

> Q:2 In your opinion, have standards changed in recent years, so that depictions of nudity and sex are more acceptable or less acceptable in movies, video cassettes, publications, and other materials depicting nudity and sex and available only to adults, but not [to] children? . . .
>
> Q:3 Do you agree or disagree that adults who want to, have the right to obtain and see movies, video cassettes, publications and other materials depicting nudity and sex and which are available only to adults, but not to children? . . .
>
> Q:4 Do you agree or disagree that adults who want to, have the right to patronize and make purchases at bookstores where publications and other materials depicting nudity and sex and which are available only to adults, but not to children? . . .

Q:5 Do you agree or disagree that adults who want to, have the right to patronize theatres where movies presenting nudity and sex are available only to adults, but not to children? . . .

Q:6 Do you think it is alright [sic] or not alright [sic], for adults who wish to do so, to obtain and see in the privacy of their homes, movies, video cassettes, publications and other materials depicting nudity and sex, which are available only to adults and not to children? . . .

Q:7 We have used the words nudity and sex in the preceding questions. What we mean by these words includes exposure of the genitals and every kind of sexual activity, no matter how graphically depicted. Is that what you understood we meant, or did you think we meant something else? . . .

After conducting a voir dire, the trial court permitted Dr. Winick to testify concerning the responses to question 2 regarding changing standards and to question 7 concerning the manner of use of the phrase "nudity and sex," but excluded all testimony relating to questions 3 through 6. Defendant argues that the excluded survey responses and Dr. Winick's proffered testimony related thereto should have been allowed because they would have assisted the jury in determining contemporary community standards. The Court of Appeals concluded that the excluded survey questions had no relevance to what the community considered obscene. We agree.

The exact same survey questions were at issue in State v. Anderson, 322 N.C. 22, 366 S.E.2d 459, although there Dr. Winick only conducted the survey among the residents of Catawba County. There, as here, the trial court allowed testimony concerning questions 2 and 7, but excluded the remainder. Having reviewed the excluded questions in *Anderson*, we stated:

> We conclude that the trial court properly excluded the cumulative results of the survey with regard to questions 3, 4, 5, and 6. Those questions amounted to little more than a referendum on the desirability of the First Amendment and N.C.G.S. § 14-190.1. The issue the jury was to decide, however, was whether the average adult, applying contemporary community standards, would find that the magazines in question appealed to a prurient interest in sex in a patently offensive manner. The trial court did not abuse its discretion when it determined that the cumulative results of the responses to questions 3, 4, 5, and 6 would not assist the jury in resolving the issue before it and excluded those questions and results. *See State v. Evangelista*, 319 N.C. at 164, 353 S.E.2d at 384; *State v. Knox*, 78 N.C. App. 493, 337 S.E.2d 154; N.C.G.S. § 8C-1, Rule 702 (1986).

Id. at 36, 366 S.E.2d at 468. *Anderson* is dispositive here. The trial court properly excluded questions 3, 4, 5 and 6 and their results, as well as Dr. Winick's related testimony.

Defendant next contends that the trial court erred in refusing to admit into evidence two magazines purchased by Mrs. Jan Frankowitz, the private investigator, in a local convenience store for comparison by the jury with the two allegedly obscene magazines which were the subject of the trial. The trial court found the "comparison" magazines to be irrelevant. Defendant argues that the availability of the magazines that Mrs. Frankowitz bought indicated community acceptance. We disagree.

The fallacy in defendant's argument is that availability does not indicate community acceptance; it indicates only availability. We agree with the Court of Appeals that availability of similar material alone means nothing more than that other persons are engaged in disseminating similar material. Evidence of mere availability of similar materials is not by itself sufficiently probative of community standards to be admissible in the absence of proof that the material enjoys a reasonable degree of community acceptance. *See* Hamling v. United States, 418 U.S. 87, 41

L.Ed.2d 590; United States v. Manarite, 448 F.2d 583 (2d Cir.), *cert. denied*, 404 U.S. 947, 30 L.Ed.2d 264 (1971). The trial court did not err in excluding this evidence.

Finally, defendant argues that the trial court erred in refusing to permit Dr. Terry Cole, a professor at Appalachian State University, to testify. Dr. Cole would have testified that he had made a systematic study under accepted methodology of sexually explicit materials with relation to the first amendment to the United States Constitution and N.C.G.S. § 14-190.1, and that based on this study, he held the opinion that the magazines in this case were not patently offensive and did not appeal to the prurient interest in sex. Dr. Cole would have testified further that the magazines had scientific, educational and political value based upon their use in marriage and sex counseling, in the classroom setting and in communication of ideas among the general population. We agree with defendant that the trial court's refusal to admit the testimony was error, but we conclude that the error was harmless.

Dr. Cole was accepted by the trial court as an expert in "speech and communication in the context of public communication." He had years of experience in teaching speech communication, including the use of sexually explicit materials, at a North Carolina university. He had used magazines of the type at issue here throughout his teaching career to assist students in the understanding and application of the first amendment and state law relating to obscenity. He had made a specific study of the subject. In our view, he was qualified to give his expert opinion that the magazines in this case were not patently offensive and did not appeal to the prurient interest in sex. However, the jury was not deprived of the essence of Dr. Cole's testimony in arriving at its verdict because that portion of Dr. Winick's testimony which was admitted covered substantially the same ground. Dr. Winick testified that the magazines were not patently offensive and that they did not appeal to the prurient interest in sex. He also testified that

they had artistic and scientific value. "[A] litigant is not harmed by the exclusion of testimony, when the same, or substantially the same, testimony is subsequently admitted." Powell v. Daniel, 236 N.C. 489, 492, 73 S.E.2d 143, 145 (1952). Defendant suffered no prejudice by the exclusion of Dr. Cole's testimony.

We conclude that defendant's trial was free of prejudicial error. The opinion of the Court of Appeals is therefore

AFFIRMED.

NO. 8627SC1346
NORTH CAROLINA COURT OF APPEALS
Filed: 18 August 1987

STATE OF NORTH CAROLINA	Cleveland County
v.	Nos. 85CRS10477
JEFF MAYES	85CRS10478

Judge BECTON, concurring in part and dissenting in part.

Considering the facts of this case, I concur in the majority's resolution of defendant's assignments of error concerning the exclusion of evidence.

Consistent with the views expressed in my dissent in Cinema I Videos v. Thornburg, 83 N.C. App. 544, 351 S.E.2d 305 (1986), I continue to believe that N.C. Gen. Stat. Sec. 14-190.1 is unconstitutional in that (1) it fails to include scienter as an element of the proscribed conduct; (2) it fails to provide for a prompt judicial determination of obscenity; and (3) it is overbroad and proscribes the private dissemination of obscenity in one's home. However, I am compelled to concur in the result reached by the majority because our Supreme Court affirmed this Court's decision in *Cinema I*. Cinema I Videos v. Thornburg, ____N.C.____, ____S.E.2d____ (No. 49A87, filed July 28, 1987).

And although the intractable and confusing nature of obscenity case law is seldom more apparent than in the federal decisions elaborating on "contemporary community standards," I nevertheless concur in the result reached by the majority that N.C. Gen. Stat. Sec. 14-190.1 (1986) is not constitutionally infirm because it fails to require jurors to apply statewide community

standards in determining whether materials are obscene.[1] Statewide standards are not required by the United States Constitution or the North Carolina Constitution.

I disagree with the majority's resolution of defendant's assignment of error concerning the jury instructions, and I therefore dissent.

The Trial Court's Refusal to Define or Elaborate on the Term "Contemporary Community Standard."

Although the Court's refusal to instruct the jury to apply a statewide standard was not error, the jury instruction was nevertheless improper. The trial judge charged the jury utilizing the language "contemporary community standard" without elaborating on its meaning or giving any direction to the jury to reach a consensus on the relevant community.

The majority begs the question by holding that the trial judge "permit[ted] jurors to apply the standards of the community from which they come, rather than requiring the application of a uniform statewide standard of obscenity," *ante* p. 8. We do not know what standard the jury applied, or if the jury applied any *one* standard. As defendant argues in his brief, "Each jury member was left to apply not only his or her individual assessment of what the average person might think, but also to determine from where the average person should be drawn. Some may have applied town or neighborhood standards, some countywide or some state-

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[1] Further, as a practical matter, I am not convinced that the application of a statewide standard would have benefited the defendant, since "in terms of danger to free expression, the potential for suppression seems at least as great in the application of a single [statewide] standard as in allowing distribution in accordance with local tastes..." because the use of a statewide standard "necessarily implies that material found tolerable in some places, but not under the [statewide] criteria, will nevertheless be unavailable where they are acceptable." Miller v. California, 413 U.S. 15, 33, 37 L.Ed.2d 419, 436 (1973) n.24.

wide notions of community acceptance."[2] And this is not an abstract or mere academic possibility. The prosecutor argued to the jury as follows:

> Ultimately, ladies and gentlemen of the jury, it's for you to decide the community standard and what the community standards are here in Cleveland County and what you consider to be the community.

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[2] Defendant made a similar argument at the charge conference as the following exchange shows:

MR SLIWA: Or Kings Mountain — the situation being where you've got jurors — Kings Mountain being in two counties, it would mean you could tell them it's — if you leave "community" undefined or even suggest to them that it's smaller than North Carolina or includes the county from which they're drawn, they're going to be asked to disregard the community — the jurors — the community that lives across the street from them because that's part of their community.

MR. BROWN: Obviously, when you have a community standard, you're going to, you know — the same book may generate a conviction in one community and not another. That's what community standard is. It depends upon how the community — and if that jury views the average adult and whatever they feel their community is.

In Charlotte — most people in Charlotte probably feel their community is just Charlotte. And I've learned now that when you come out to these more rural areas, "community" here probably doesn't mean just Shelby. It may. I don't know what they take it from. But in the more rural areas, I suspect they'd feel like their community encompasses a bit more of outlying territory, but, you know, since the legislature struck "statewide", I think they meant for juries to just base it on whatever they feel their community is; and I don't think it's for us to define that for them —

THE COURT: All right.

MR. BROWN: — in any way, shape or form.

THE COURT: All right, Request Number Twenty-one is DENIED.

MR. SLIWA: Is Your Honor going to tell the jurors that it's up to them to determine what the community is?

MR. BROWN: Just tell them they have to apply their community standard.

MR. SLIWA: Without asking them to define what the community is?

MR. BROWN: Yes.

MR. SLIWA: Specific EXCEPTION to that.

* * *

Now, when you decide that, ladies and gentlemen, I'll ask you to think about where you live, whether it's King's Mountain, whether it's Boiling Springs or here in the City of Shelby. You think about your community and think about the entire county and if you live right on a county line, think of your community, whatever you consider your community to be.

* * *

You know, the bottom line is it's your duty — you speak for the community. And the reason that the legislature put the community standard in her is that, you know, it's just entirely possible that the community in Charlotte or the community in Greensboro or the community in San Francisco or the community in Buffalo may have differing views about just what they will tolerate in these materials — what obscenity really means. And so that's why the community standard is in there and it is now the — it's your turn to speak for the community and decide what the average adult in this community will and will not tolerate as to these types of materials.

In contrast, the defense urged the jury that the standard should be a statewide one:

And I don't mean to be saying by my argument that Cleveland County is the community, because some of you folk live in Kings Mountain, and Kings Mountain, as we all know, is right on the border and a part of Kings Mountain is right over there in Gaston County. So it's not Cleveland County and it's not Gaston County. In fact, the problem is, you've got to figure out what "community" means.

* * *

But I'll say to you, as far as what the average person thinks, it just hasn't been proved.

We tried to conduct a survey and get it in here to show you about it — what we think the survey would indicate the average person in North Carolina — because it seems to me,

> folks, that the standard is North Carolina. Because down here at number four, it talks about whether it's privileged or protected under the North Carolina Constitution, and we can't have one law in North Carolina for people who live in Kings Mountain and another one for the people who live in Shelby. We've got one law for North Carolina, so it seems to me you got to think about North Carolina.
>
> * * *
>
> And where is there any evidence about what the contemporary community standard is? In fact, what is it? Ask yourself that. What is the community?
>
> A lot of you good folks probably watch television that emanates out of Charlotte — Channel Nine and Channel Three. Some of you may take the Charlotte paper. A few of you are from Charlotte. Some of you are from Ohio. What does "community" mean? What does it mean to you?

In light of these arguments, a clarifying instruction was particularly important.

To support its conclusion that the trial "judge's instructions in this case [did not] contravene the Constitution of the United States" by failing to specify what is meant by "community," *ante* p.7, the majority relied on Jenkins v. Georgia, 418 U.S. 153, 157, 41 L.Ed.2d 642, 648 (1974). In my view, *Jenkins* should not control the disposition of this case. First, the *Jenkins* language relied upon by the majority, which effectively gives jurors unbridled discretion to determine the relevant community, seems incongruous with other language in *Jenkins* that jurors should not have "unbridled discretion in determining what is 'patently offensive'." *Id.* at 160, 41 L.Ed.2d at 650. More important, however, I am loathe to accept as controlling language from *Jenkins* which is based on a supposition. The *Jenkins* Court said "[we] also agree with the Supreme Court of Georgia's *implicit approval* of the trial court's instructions directing jurors to apply 'community standards' without specifying what 'community'." *Id.* at 157, 41

L.Ed.2d at 648. (emphasis added). Additionally, the language on which the majority relies is dicta. The court held that Jenkins' conviction should be reversed because the film "Carnal Knowledge" did not depict sexual conduct in a patently offensive way.

Moreover, the *Jenkins* Court's attempt to interpret Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419 (1973) was clarified further in Hamling v. United States, 418 U.S. 87, 41 L.Ed.2d 590 (1974). The *Hamling* Court stated that "[t]he result of the *Miller* cases, ... as a matter of constitutional law ..., is to permit a juror sitting in obscenity cases to draw on knowledge of the *community or vicinage from which he comes* in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case." Hamling v. United States, 418 U.S. at 105, 41 L.Ed.2d at 613 (emphasis added).

In my view, under the majority's interpretation, which permits a jury to define the relevant community, the statute would be void for vagueness because "people of common intelligence must necessarily guess at its meaning and differ as to it's application." *See* Treants Enterprises, Inc. v. Onslow County, 83 N.C. App. 345, 350 S.E.2d 178 (1986), *citing* State v. Vestal, 281 N.C. 517, 189 S.E.2d 152 (1972). Neither the prosecutor nor the defense counsel could ascertain from the plain language of the statute what community should be used when determining whether the materials were patently offensive. The average merchant could hardly be expected to do so.

Separate and apart from the constitutional issues in this case, the statute itself supports my belief that defendant's conviction should not stand when the jurors may have used different standards to judge his conduct. In 1985, the North Carolina Legislature deleted the statewide community standard that had been required since 1971. In doing so, it did not intend that some or all of the twelve jurors in obscenity cases thereafter use a statewide standard. In my view, and consistent with the dictates of *Miller*

and *Hamling*, the legislature intended that jurors would apply the standards of the community from which the jury pool was drawn. The *Hamling* Court said:

> Since this case was tried in the Southern District of California, and presumably jurors from throughout that judicial district were available to serve on the panel which tried petitioners, it would be the standards of that "community" upon which the jurors would draw.

418 U.S. at 105-06, 41 L.Ed.2d at 613-14.

In their article, generally upholding the North Carolina Obscenity Statutes, Currin and Showers, while noting that defendants will often attempt to limit or expand the community and that prosecutors will in some cases choose the most morally conservative venue, conclude that "the most prudent instruction should adopt local community standards phrased so that 'the jury is entitled to draw on its own knowledge of the moral views and sense of the average person in the community from which [he] came'." (Footnote omitted.) Currin and Showers, Regulation of Pornography — The North Carolina Approach, 21 Wake Forest Law Review No. 2, 1986, pp. 289, 290. Because no such instruction was given in this case, defendant is entitled, in my view, to a new trial.

No. 8627SC1346
NORTH CAROLINA COURT OF APPEALS
Filed: 18 August 1987

STATE OF NORTH CAROLINA	Cleveland County
v.	Nos. 85CRS10477
JEFF MAYES	85CRS10478

Appeal by defendant from Owens, Judge. Judgment entered 21 August 1986, Superior Court, Cleveland County. Heard in the Court of Appeals 11 June 1987.

Defendant was charged with two counts of intentional dissemination of obscenity in violation of G.S. 14-190.1. At trial, the State presented evidence tending to show that on 1 October 1985, Sergeant Ralph McKinney of the Cleveland County Sheriff's Department, went to the Shelby Three Adult Bookstore on Highway 74 west of Shelby in Cleveland County. Sgt. McKinney was dressed in plain clothes. As he approached the door of the bookstore, he was met by defendant, who asked Sgt. McKinney if he was a "cop." Sgt. McKinney responded by asking "if I looked like a cop." Defendant remarked that he had been expecting the police all day. Sgt. McKinney asked, "You mean this stuff is illegal now?" Defendant responded, "Under the new law, it is."

Sgt. McKinney followed defendant into the bookstore and then browsed for about twenty minutes. He selected two magazines, took them to the cash register, and placed them upon the counter. Defendant rang up the sale and Sgt. McKinney paid him for the magazines.

The State introduced both magazines into evidence. One magazine, entitled "Express — The Pursuit of Pleasure," contains erotic stories, reviews of various erotic magazines and video tapes, interviews, advertisements, and many graphic and explicit photographs of nude and partially clad men and women engaged in var-

ious sexual acts, including vaginal intercourse, anal intercourse, fellatio, cunnilingus, masturbation, group sex and bondage. The other magazine, entitled "Cockscrew," consists solely of graphic and explicit photographs of two males, sometimes nude and sometimes partially clad, engaging in fellatio, anal intercourse, and masturbation, with a tenuous and scant storyline running throughout.

Defendant did not testify. Dr. Charles Winick, a psychologist called as a defense witness, testified that, in his opinion, the magazines appealed to a normal interest in sex, rather than a prurient interest, and had serious artistic and scientific merit. Upon the State's objection, the trial court excluded the testimony of a private investigator as to the availability of similar materials in Cleveland County and adjoining counties, and the testimony of an expert witness in the field of communication as to whether the magazines fell within the statutory definition of obscenity.

Defendant was convicted of both counts by the jury and judgment was entered upon the verdicts. Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Steven F. Bryant, for the State.

Lipsitz, Green, Fahringer, Roll, Schuller & James, by Stanley J. Sliwa and Herbert L. Greenman; and James, McElroy & Diehl, P.A., by Edward T. Hinson, Jr., for the defendant-appellant.

MARTIN, Judge.

Defendant contends that his convictions must be set aside for several reasons. First of all, he contends that his conviction is constitutionally invalid because the jury was not required to apply a statewide contemporary community standard in determining whether the materials at issue in this case were obscene. He also

assigns error to the exclusion of: (1) evidence as to the availability of similar materials in the community; (2) evidence as to the results of a public opinion survey; and (3) expert opinion testimony upon the issue of the obscenity of the materials. In addition, he challenges the sufficiency of the State's evidence, assigns error to portions of the trial court's instructions to the jury, and contests the constitutionality of G.S. 14-190.1 on a number of grounds. For the following reasons, we hold that defendant received a fair trial, free of prejudicial error.

We begin our analysis by stating that which is firmly established: obscene material receives no protection under the First Amendment to the United States Constitution. Miller v. California, 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607, *reh'g denied*, 414 U.S. 881, 38 L.Ed.2d 128, 94 S.Ct. 26 (1973); Roth v. United States, 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304, *reh'g denied*, 355 U.S. 852, 2 L.Ed.2d 60, 78 S.Ct. 8 (1957). "It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." Chaplinsky v. New Hampshire, 315 U.S. 568, 572, 86 L.Ed.2d 1031, 1035, 62 S.Ct. 766, 769 (1942). States, therefore, are free to enact criminal statutes prohibiting the dissemination of obscene material, provided that specified guidelines are followed so that protected speech is not also prohibited. *See Miller, supra*.

By his first assignment of error, defendant contends that G.S. 14-190.1 is constitutionally infirm because it does not require the jury to apply statewide community standards in determining whether materials are obscene. He also contends that his conviction is invalid because the trial court failed to instruct the jury to apply a statewide standard or to define for the jury the relevant community whose standards were to be applied. We reject his contentions.

G.S. 14-190.1(b) provides that material is obscene if:

(1) The material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (c) of this section; and

(2) The average person applying contemporary community standards relating to the depiction or description of sexual matters would find that the material taken as a whole appeals to the prurient interest in sex; and

(3) The material lacks serious literary, artistic, political, or scientific value; and

(4) The material as used is not protected or privileged under the Constitution of the United States or the Constitution of North Carolina.

G.S. 14-190.1(c) defines sexual conduct as:

(1) Vaginal, anal, or oral intercourse, whether actual or simulated, normal or perverted; or

(2) Masturbation, excretory functions, or lewd exhibition of uncovered genitals; or

(3) An act or condition that depicts torture, physical restraint by being fettered or bound, or flagellation of or by a nude person or a person clad in undergarments or in revealing or bizarre costume.

The language used in this statute closely follows the three-pronged test set forth by the United States Supreme Court in Miller v. California, *supra*:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, [citations omitted]; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applica-

> ble state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24, 37 L.Ed.2d at 431, 93 S.Ct. at 2615. As recently as the present term, the Supreme Court has reemphasized that contemporary community standards are to be applied to the first two prongs, while the third prong is to be examined according to the reasonable person standard. *See* Pope v. Illinois, 481 U.S. ____, 95 L.Ed.2d 439, 107 S.Ct. 1918 (1987).

In *Miller*, the court held that the use of national standards to determine whether material is obscene is not a constitutional requirement, and that states could properly employ statewide contemporary community standards. *Miller*, however, does not *require* the use of statewide standards. In Jenkins v. Georgia, 418 U.S. 153, 41 L.Ed.2d 642, 94 S.Ct. 2750 (1974), the trial court instructed the jury to apply "community standards" without defining the geographical limits of "community." The Supreme Court approved the instructions, stating that:

> *Miller* held that it was constitutionally permissible to permit juries to rely on the understanding of the community from which they came as to contemporary community standards, and the States have considerable latitude in framing statutes under this element of the *Miller* decision. A State may choose to define an obscenity offense in terms of "contemporary community standards" as defined in *Miller* without further specification . . . or it may choose to define the standards in more precise geographic terms, as was done by California in *Miller*.

Id. at 157, 41 L.Ed.2d at 648, 94 S.Ct. at 2753. *See also* Hamling v. United States, 418 U.S. 87, 41 L.Ed.2d 590, 94 S.Ct. 2887, *reh'g denied*, 419 U.S. 885, 42 L.Ed.2d 129, 95 S.Ct. 157 (1974). Our General Assembly chose not to define "community" in precise geographic terms when it enacted G.S. 14-190.1. In the absence of a precise statutory specification of "community," the trial judge properly declined to judicially restrict or expand that

term, permitting the jurors to apply the standards of the community from which they came in much the same manner as they would determine "the propensities of a 'reasonable' person in other areas of the law." *Id.* at 104-105, 41 L.Ed. at 613, 94 S.Ct. at 2901. Accordingly, we hold that neither G.S. 14-190.1 nor the judge's instructions in this case contravene the Constitution of the United States by failing to specify what is meant by "community."

Defendant argues, however, that the use of a statewide standard is required by Article I, § 19 of the Constitution of North Carolina, which provides in part that "[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges . . . or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied equal protection of the laws. . . ." Defendant argues that use of any standard smaller than a statewide one is impermissible because such a standard would make it illegal in some parts of this State to do that which is legal in other parts of the State.

G.S. 14-190.1 makes it a criminal offense in North Carolina to disseminate obscenity. This is so throughout the State. It is true that the application of standards of a community smaller than statewide may result in the possibility that material considered obscene in some areas of the State will not be considered obscene in other areas. This possibility does not, however, render the statute unconstitutional. In *Miller, supra*, the Supreme Court held that the federal Constitution does not require materials to be judged in the light of hypothetical national standards, saying that it is unrealistic and not constitutionally required that "the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." *Id.* at 32, 37 L.Ed.2d at 435, 93 S.Ct. at 2619. In *Hamling, supra*, the Court held that a juror sitting in obscenity cases is permitted "to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person, applying contemporary

community standards' would reach in a given case." *Id.* at 105, 41 L.Ed.2d at 613, 94 S.Ct. at 2901.

> The fact that distributors of allegedly obscene materials may be subjected to varying community standards in the various federal judicial districts into which they transmit the materials does not render a federal statute unconstitutional because of the failure of application of uniform national standards of obscenity.

Id. at 106, 41 L.Ed.2d at 614, 94 S.Ct. at 2902. In *Jenkins, supra*, the Court held that in state obscenity cases, jurors need not be instructed "to apply the standards of a hypothetical statewide community." *Id.* at 157, 41 L.Ed.2d at 648, 94 S.Ct. at 2753.

We believe that the reasoning of the United States Supreme Court is applicable as well to the "equal protection of the laws" clause of our State Constitution. Ours is a large and diverse State, and it is unrealistic to expect to find that the same standards exist throughout the State or that the residents of one part of the State would have knowledge of the community standards held in another area. Thus we hold that permitting jurors to apply the standards of the community from which they come, rather than requiring the application of a uniform statewide standard of obscenity, does not violate the equal protection clause of the North Carolina Constitution.

Defendant next argues that the trial court erred by preventing the jury from hearing certain profferred evidence. Specifically, defendant assigns error to the exclusion of testimony by Dr. Charles Winick, a psychologist, sex therapist, and public opinion researcher, concerning the results of a statewide survey which he conducted for the defense; the exclusion of opinion testimony by Dr. Terry Cole, a speech communications professor at Appalachian State University, as to whether the materials at issue in this case were obscene; and the exclusion of testimony by private investigator Jan Frankowitz as to the availability of similar mate-

rial in the community. We hold that the trial court committed no error prejudicial to defendant by excluding the testimony of either expert witness or of Ms. Frankowitz.

The United States Supreme Court has held that there is no constitutional need for expert testimony that the subject materials are obscene once the materials have been placed in evidence, as the materials themselves are the best evidence of what they represent. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 37 L.Ed.2d 446, 93 S.Ct. 2628, *reh'g denied*, 414 U.S. 881, 38 L.Ed.2d 128, 94 S.Ct. 27 (1973). The defense is free, however, to introduce expert testimony as to the obscenity of the materials. Kaplan v. California, 413 U.S. 115, 37 L.Ed.2d 492, 93 S.Ct. 2680, *reh'g denied*, 414 U.S. 883, 38 L.Ed.2d 131, 94 S.Ct. 28 (1973). While it is established that expert testimony is admissible in obscenity trials, the trial court retains "wide discretion in its determination to admit and exclude evidence, and this is particularly true in the case of expert testimony." *Hamling, supra* at 108, 41 L.Ed.2d at 615, 94 S.Ct. at 2903. Once the expert witness demonstrates "knowledge, skill, experience, training or education" as required by G.S. 8C-1, Rule 702, "the test of admissibility is helpfulness." Brandis, *North Carolina Evidence* § 132 (Cumm. Supp. 1986). As explained in State v. Knox, 78 N.C. App. 493, 337 S.E.2d 154 (1985), "[t]he test for admissibility is whether the jury can receive 'appreciable help' from the expert witness. 7 J. Wigmore, *Evidence* Sec. 1923 at 29 (Chadbourn rev. 1978). Applying this test requires balancing the probative value of the testimony against its potential for prejudice, confusion or undue delay." *Id.* at 495, 337 S.E.2d at 156.

Defendant first argues that the trial court erred by preventing Dr. Winick from testifying as to results of a survey he conducted in North Carolina. That survey, conducted among 400 adults in 41 counties, contained the following questions pertinent to defendant's argument:

2. In your opinion, have standards changed in recent years, so that depictions of nudity and sex are more acceptable or less acceptable in movies, video cassettes, publications, and other materials depicting nudity and sex and available only to adults, but not to children?

3. Do you agree or disagree that adults who want to, have the right to obtain and see movies, video cassettes, publications and other materials depicting nudity and sex and which are available only to adults, but not to children?

4. Do you agree or disagree that adults who want to, have the right to patronize and make purchases at bookstores where publications and other materials depicting nudity and sex are available only to adults, but not to children?

5. Do you agree or disagree that adults that want to, have the right to patronize theatres where movies presenting nudity and sex are available only to adults, but not to children?

6. Do you think it is alright or not alright, for adults who wish to do so, to obtain and see in the privacy of their homes, movies, video cassettes, publications and other materials depicting nudity and sex, which are available only to adults and not to children?

7. We have used the words nudity and sex in the preceding questions. What we mean by these words includes exposure of the genitals and every kind of sexual activity, no matter how graphically depicted. Is that what you understood we meant, or did you think we meant something else?

After conducting a *voir dire*, the court permitted Dr. Winick to testify concerning the responses to questions 2 and 7 of the survey but excluded any testimony relating to questions 3 through 6. Defendant argues that this exclusion was improper because it removed from the jury's consideration information which would have been valuable in assisting it in determining community standards. We find no error in the trial court's ruling.

The questions excluded by the court have absolutely no relevance to what the community considers obscene. Questions 3, 4 and 5 are general opinion questions as to what adults "have the right" to obtain and view; they have little, if any, probative value on the issue of whether "the average person applying contemporary community standards" would find that the subject magazines are patently offensive or appeal to the prurient interest in sex. We agree with the analysis of the Georgia Court of Appeals in Flynt v. State, 153 Ga. App. 232, 264 S.E.2d 669, *cert. denied*, 449 U.S. 888, 66 L.Ed.2d 114, 101 S.Ct. 245 (1980):

> One may be of the opinion that adults have the right to obtain and view materials depicting "nudity and sex" although they would themselves regard the material as exceeding the bounds of "contemporary community standards" and as patently offensive. The survey asked no more than whether the respondents objected to the dissemination of materials depicting nudity and sex to willing adults, not whether they regarded material such as that depicted in appellant's magazines as obscene in themselves.

Id. at 233, 264 S.E.2d at 672.

Similarly, question 6 did not address the issue of the obscenity of any material, but only the question of whether adults had a right to view, in the privacy of their homes, materials depicting nudity and sex. However, G.S. 14-190.1 prohibits only the intentional dissemination of obscenity, not the private possession thereof. The First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime. Stanley v. Georgia, 394 U.S. 557, 22 L.Ed.2d 542, 89 S.Ct. 1243 (1969). Therefore, this question has no probative value regarding the question of contemporary community standards, or even regarding the crime with which defendant was charged. We find no abuse of discretion by the trial court in excluding evidence of these survey questions.

Defendant also assigns error to the court's exclusion of expert testimony by Dr. Terry Cole as to whether in his opinion, the magazines in question depict sexual conduct in a patently offensive way, whether they appeal only to a prurient interest, and whether they have serious literary, artistic, political, or scientific value. Defendant's proffer of evidence reveals that Dr. Cole would have testified, in summary, that due to the fact that the magazines were offered for sale at places frequented only by adults who chose to do so, he was of the opinion that the magazines are not patently offensive. He would also have testified that the magazines have scientific value because of their use in speech classes when discussing obscenity, as well as in marriage counseling and sex therapy, and that they have political value because they contribute to the public debate concerning obscenity and sexuality. We hold that the trial judge did not commit reversible error by excluding Dr. Cole's testimony.

The issues before the jury were whether, under contemporary community standards, the magazines are patently offensive and appeal to prurient interest and whether they have literary, artistic, political, or scientific value. The inquiry put to Dr. Cole with respect to whether or not the material is patently offensive was not premised upon his knowledge of contemporary community standards, and was therefore irrelevant to, and could not have assisted the jurors in deciding, the issues in the case. *See* State v. Knox, *supra*. Neither the fact that the materials might be used in teaching classes on obscenity and in classroom discussions with respect thereto, nor the fact that the materials are relevant to the public debate on the issue of obscenity establish that the materials have serious scientific or political value. Under such circular reasoning, nothing could ever be found obscene because its value derives from the fact that it may be obscene. Such a result was certainly not intended by the Supreme Court when it established the *Miller* test. We find no error in the exclusion of this testimony.

Dr. Cole also testified on *voir dire* that the materials at issue in this case have scientific value in marriage and sex counseling and do not appeal to a prurient interest in sex. We question whether such testimony is within the expertise of Dr. Cole, who was tendered and admitted as an expert in "speech communication in the context of public communication." However, even assuming that the trial court should have permitted Dr. Cole to state these opinions before the jury, defendant has suffered no prejudice by their exclusion because the same evidence was subsequently placed before the jury through the testimony of Dr. Winick. "[A] litigant is not harmed by the exclusion of testimony, when the same, or substantially the same, testimony is subsequently admitted." Powell v. Daniel, 236 N.C. 489, 492, 73 S.E.2d 143, 145 (1952).

Defendant also assigns error to the trial court's refusal to allow Jan Frankowitz to testify before the jury concerning her purchase of two magazines, described as similar to the materials at issue, from a "Pantry" convenience store in Shelby. Defendant argues that this evidence was probative of, and therefore relevant to, the issue of the "contemporary community standard with respect to patent offensiveness and prurient appeal of sexually explicit materials." We disagree. Availability of similar material alone means nothing more than that other persons are engaged in similar activities. *Hamling, supra; Flynt, supra*. Evidence of mere availability of similar materials is not by itself sufficiently probative of community standards to be admissible in the absence of proof that the material enjoys a reasonable degree of community acceptance. *See* United States v. Manarite, 448 F.2d 583 (2d Cir.), *cert. denied*, 404 U.S. 947, 30 L.Ed.2d 264, 92 S.Ct. 298 (1971). Defendant argues that the availability of the magazines bought by Ms. Frankowitz in a neighborhood convenience store indicates community acceptance. On the contrary, this indicates only availability, not acceptance. We find no error in the trial court's exclusion of this evidence.

Defendant next assigns as error the trial court's denial of his motions to dismiss and for judgment notwithstanding the verdict. Citing Smith v. California, 361 U.S. 147, 4 L.Ed.2d 205, 80 S.Ct. 215 (1959), *reh'g denied*, 361 U.S. 950, 4 L.Ed.2d 383, 80 S.Ct. 399 (1960), defendant accurately argues that dissemination of obscenity cannot be a strict liability crime, and that G.S. 14-190.1(a) requires proof of both intent and guilty knowledge. *See* Cinema I Video, Inc. v. Thornburg, 83 N.C. App. 544, 351 S.E.2d 305 (1986), *aff'd.*, ____N.C.____, ____S.E.2d____ (No. 49A87, filed 28 July 1987), *citing* State v. Bryant and State v. Floyd, 16 N.C. App. 456, 192 S.E.2d 693 (1972), *appeal dismissed and cert. denied*, 282 N.C. 583, 193 S.E.2d 747, *vacated and remanded*, 413 U.S. 913, 37 L.Ed. 2d 1036, 93 S.Ct. 3065, *reaffirmed*, 20 N.C. App. 223, 201 S.E.2d 211 (1973), *affirmed*, 285 N.C. 27, 203 S.E.2d 27, *cert. denied*, 419 U.S. 974, 42 L.Ed.2d 188, 95 S.Ct. 238 (1974). Defendant's contention that the State presented insufficient evidence to show defendant's guilty knowledge, however, is without merit. At trial, Sgt. McKinney testified that defendant told him that the materials for sale in the bookstore were illegal. In addition, there was testimony tending to show that defendant was the store manager. Treating this evidence in the light most favorable to the State, as we must, State v. Earnhardt, 307 N.C. 62, 296 S.E.2d 649 (1982), we hold that it is sufficient to permit a reasonable inference that defendant knew the nature and content of the materials he sold to Sgt. McKinney. The evidence was, therefore, sufficient to withstand defendant's motions.

By the same argument in his brief, defendant assigns error to the trial court's instructions to the jury on the issue of defendant's intent and guilty knowledge. Defendant contends that the trial court's denial of numerous requests for jury instructions resulted in a failure by the court to explain to the jury "the explanatory and guiding principles needed to properly apply the complex principles of law involved to the facts of this case." We disagree.

A judge's charge to the jury is sufficient when it fully instructs the jury on all substantive areas of the case and adequately defines and applies the law thereto. State v. McNeil, 47 N.C. App. 30, 266 S.E.2d 824, *cert. denied and appeal dismissed*, 301 N.C. 102, 273 S.E.2d 306 (1980), *cert. denied*, 450 U.S. 915, 67 L.Ed.2d 339, 101 S.Ct. 1356 (1981). Although a judge is required to give such instructions as may be specifically requested, when correct and supported by the evidence, the instructions need not be in the exact language requested; it is sufficient if the court gives the instructions in substance. State v. Davis, 291 N.C. 1, 229 S.E.2d 285 (1976); State v. Travatello, 24 N.C. App. 511, 211 S.E.2d 467 (1975). The court's instructions must be read as a whole and in context, and individual portions will not be held prejudicial if the charge as a whole is correct. State v. Craig and State v. Anthony, 308 N.C. 446, 302 S.E.2d 740, *cert. denied*, 464 U.S. 908, 78 L.Ed.2d 247, 104 S.Ct. 263 (1983).

In the present case, the trial judge properly instructed the jurors that, to convict defendant, they must find beyond a reasonable doubt that he intentionally disseminated material which, when viewed in its entirety, is obscene. The judge instructed the jury that the State bore the burden of proving beyond a reasonable doubt that defendant "knew the content, character and nature of the magazines as a whole that he sold. . . ." The instructions given were a sufficient statement of the law with respect to defendant's intent and guilty knowledge. This assignment of error is overruled.

We have also reviewed defendant's other assignments of error with respect to the court's instructions to the jury. We conclude that the instructions, when construed as a whole and in context, were correct.

Finally, defendant contends that the trial court should have dismissed the charges because G.S. 14-190.1 is unconstitutional. He

bases his constitutional challenge to the statute upon five asserted shortcomings: (1) that the statute fails to include scienter as an element of the proscribed conduct; (2) that it fails to provide for a prompt judicial determination of obscenity; (3) that it is overbroad in that it does not specify that the unlawful dissemination of obscenity is limited to that dissemination which occurs in a public place; (4) that it is overbroad in its definition of "sexual conduct;" and (5) that it fails to require that material be "taken as a whole" in the determination of the material's literary, artistic, political, or scientific value. Each of these issues has previously been decided adversely to defendant. Cinema I Video v. Thornburg, *supra*. We find no error in the denial of his motion to dismiss based upon the asserted unconstitutionality of the statute.

In conclusion, we hold that defendant received a fair trial, free from prejudicial error.

No error.

Judge Cozort concurs.

Judge Becton concurs in part and dissents in part.

DR. WINICK'S SURVEY QUESTIONS AND RESULTS PROFFERED IN *STATE v. MAYES*

Q:1 Could you please tell me what county you live in?

Q:2 In your opinion, have standards changed in recent years, so that depictions of nudity and sex are more acceptable or less acceptable in movies, video cassettes, publications, and other material depicting nudity and sex and available only to adults, but not the children? More acceptable - 73%; less acceptable - 23%; Neither/DK - 4%

Q:3 Do you agree or disagree that adults who want to, have the right to obtain and see movies, video cassettes, publications and other materials depicting nudity and sex and which are available only to adults, but not to children? Agree - 78%; Disagree - 21%; Neither/DK - 1%

Q:4 Do you agree or disagree that adults who want to, have the right to patronize and make purchases at bookstores where publications and other materials depicting nudity and sex and which are available only to adults, but not to children? Agree - 70%; Disagree - 28%; Neither/DK - 2%

Q:5 Do you agree or disagree that adults who want to, have the right to patronize theatres where movies presenting nudity and sex are available only to adults, but not to children? Agree - 71%; Disagree - 28%; Neither/DK

Q:6 Do you think it is alright [sic] or not alright, for adults who wish to do so, to obtain and see in the privacy of their homes, movies, video cassettes, publications and other

materials depicting nudity and sex which are available only to adults and not to children? Alright - 73%; Not Alright - 26%; Neither/DK - 1%

Q:7 We have used the words nudity and sex in the preceding questions. What we mean by these words includes exposure of the genitals and every kind of sexual activity, no matter how graphically depicted. Is that what you understood we meant, or did you think that we meant something? Understood - 90%; Something else - 10%

Q:8 What did you think we meant?

Q:9 Do you now receive or have you ever received cable television?

Q:10 Did you ever refuse to take cable television because some of the special pay cable services offered sex-oriented materials?

DR. BELL'S ILLINOIS SURVEY QUESTIONS AND RESULTS (RULED ADMISSIBLE IN *PEOPLE V. NELSON*, 88 Ill.App.3d 196, 410 N.E.2d 476 [1980])

Q: Is it your opinion that in recent years the standards in Illinois have changed so that depictions of nudity and sexual activities in movies and publications available only to adults are now more acceptable or less acceptable?

More acceptable, 60.5%; less acceptable, 25.7%; neither, 7.8%; don't know, 4.4%; no answer, 1.3%, other, .2%.

Q: Do you think it is acceptable or not acceptable in Illinois for the average adult to see any depiction of actual or pretended sexual activities shown in movies and publications that he or she wants to?

Acceptable, 58.1%; not acceptable, 33.2%; neither, 5.2%; no answer, 3.5%.

Q: Adults who want to view them, to purchase magazines that depict nudity and actual or pretended sexual activities?

Alright, 63.1%; not alright, 31.0%; neither, 2.2%; no answer, 3.6%.

Q: Movie theaters, restricting attendance to adults only, to show films that depict nudity and actual or pretended sexual activities for adults who want to attend?

Alright - 59.2%; not alright, 32.1%, neither, 4.3%; no answer, 4.4%.

Q: Bookstores that restrict admittance to adults only to sell publications and movies depicting nudity and actual or pretended sexual activities for adults who want to go inside them?

Alright, 54.8%; not alright, 37.3%; neither, 4.0%; no answer, 3.9%.

Q: Arcades that restrict admittance to adults only to show films that depict nudity and actual or pretended sexual activities?

Alright, 48.7%; not alright, 42.1%; neither, 3.5%; no answer, 5.7%.

Q: Adults who want to, in the privacy of their homes, to see movies and publications that depict nudity and actual or pretended sexual activities?

Alright, 67.4%; not alright, 25.7%; neither, 2.9%; no answer, 4.0%.

Q: We have used the phrases "nudity" and "sexual activities" in the interview. What we mean by these terms is total male and/or female nudity, and sexual intercourse including all kinds of sexual variations. Is that what you understood we meant, or did you think we meant something else?

Understood, 93.4%; something else, 3.0%; neither, 1.8%; no answer, 1.8%.

INDIANA SURVEY QUESTIONS (RULED ADMISSIBLE IN *SALIBA v. STATE*, 475 N.E.2d 1181 [Ind.App. 1985])

Q: In your opinion, have standards in Indiana changed in recent years so that depictions of nudity and sexual activities in movies and publications available only to adults are now more acceptable or less acceptable, or haven't they changed much?

Q: Do you personally think it is acceptable or not acceptable for the average adult to see any depiction of actual or pretended sexual activities shown in movies and publications that he or she wants to?

Q: In your opinion, is it now alright or not alright in the State of Indiana for adults who want to view them, to purchase magazines that show nudity and actual or pretended sexual activities?

Q: In your opinion, is it now alright or not alright in the State of Indiana for movie theaters, restricting attendance to adults only, to show films that depict nudity and actual or pretended sexual activities for adults who want to attend?

Q: In your opinion, is it now alright or not alright in the State of Indiana for bookstores that restrict admittance to adults to sell publications and movies depicting nudity and actual or pretended sexual activities for adults who want to go inside and buy them?

Q: In your opinion, is it now alright or not alright in the State of Indiana for arcades that restrict admittance to adults only to show films that depict nudity and actual or pretended sexual activities?

Q: In your opinion, is it now alright or not alright in the State of Indiana for adults who want to, in the privacy of their homes, to see movies and publications that depict nudity and actual or pretended sexual activities?

Q: Finally, we have used the phrases "nudity" and "sexual activities" in the interview. What we mean by these terms is total male and/or female nudity, and sexual intercourse including all kinds of sexual variation. Is that what you understood we meant, or did you think we meant something else?